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IN THE

Supreme Court of the United States

OCTOBER TERM 1939

No. 12

UNITED STATES OF AMERICA, *Petitioner*

vs.

APPALACHIAN ELECTRIC POWER COMPANY, *Respondent*

MOTION OF THE STATES OF VIRGINIA AND WEST VIRGINIA FOR CONTINUANCE OF CAUSE

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Richmond, Virginia.
April, 1940.

IN THE

Supreme Court of the United States

OCTOBER TERM 1939

No. 674

UNITED STATES OF AMERICA, *Petitioner*

vs.

APPALACHIAN ELECTRIC POWER COMPANY, *Respondent*

MOTION OF THE STATES OF VIRGINIA AND WEST VIRGINIA FOR CONTINUANCE OF CAUSE

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF SAID COURT:

Now come the States of Virginia and West Virginia by their respective Attorneys General and jointly move this Court for a continuance of the above-entitled cause to the October Term 1940, or, in the alternative, for the postponement of hearing of this cause to the latest day certain on which said cause can be heard during the October Term 1939, but not earlier than May 15, 1940. The grounds upon which this motion is based are:

1. The questions sought to be presented by the United States in this cause vitally involve the soverign

and proprietary rights of the States of Virginia and West Virginia; and if such questions be held properly determinable herein, the importance of their determination to the said States can hardly be overstated. Among the most important and valuable natural resources of the States of Virginia and West Virginia are New River and various other rivers and streams within their domain which are valueless for purposes of navigation or commerce but are of incalculable value to the said States and their people for water power, recreational and other uses.

2. The Sates of Virginia and West Virginia have each adopted a policy aimed to promote and encourage the development and utilization of water power of the streams within their respective borders and thereby to increase their tax resources and to promote industrial development and the welfare and prosperity of the States and the peoples thereof. Furthermore, these States have adopted statutory schemes in pursuance of said policies, providing for the conservation, development and regulation of the waters within their respective borders and for the regulation of the output and distribution of, and the prices charged for, the electricity resulting from such development of those waters.

3. An examination of the petition in certiorari filed by the United States in the above-entitled cause discloses that this Court will be asked, with regard to waters where there is involved no public land nor any other Federal property:

a) To hold in practical effect that water powers within the several States, whether on navigable or non-navigable streams, may not be developed or

utilized by the several States, or under their jurisdiction and authority, but instead may be developed only if such development meets the approval of the Federal Power Commission and, if so, then only pursuant to the acceptance of a Federal license containing numerous burdensome (and, as these States believe, unconstitutional) restrictions upon the utilization of such water powers, which restrictions are in conflict with the policies adopted by the States of Virginia and West Virginia for the conservation, regulation and development of their water resources.

b) To hold that the water powers of the several States may be developed only, if at all, under a Federal license which would have the effect of vesting in the United States, rather than in the several States ultimate reversionary or residual proprietary rights therein and the exercise of local police powers over and in connection with such projects and their operation, and even of providing for the regulation of intrastate rates for electricity developed and sold from such water resources within the various States.

c) To hold that the United States may, as a condition to permitting the development of water power resources within the several States, whether on navigable or non-navigable streams, compel the respective States or municipalities or developers (duly authorized by the States) to accept a Federal license which would give the United States a contractual right to take over the power development at the end of the Federal license period upon payment of the "net investment" (as determined by the Federal Power Commission and subject to numerous Federal statutory deductions) or its then fair value,

whichever is the less, with the consequent destruction of the tax resources of the several States and of their sovereign and proprietary rights to acquire such projects for themselves when and as they deem such acquisition in the best interests of themselves and their peoples.

d) To hold that water power resources within the several States may be developed only under plans and conditions which "in the judgment of the (Federal Power) Commission will be best adapted to a comprehensive scheme * * * of water power development and of other beneficial public uses" (16 USC 803 (a)), in complete derogation of the sovereign rights of the several States to authorize, regulate and control the development of their streams for water power, recreational and other purposes as such States deem for the best interests of themselves and their people, subject only to the admittedly constitutional requirement that there be no interference with interstate or foreign commerce.

e) To hold that the development of water powers within the several States, even on non-navigable streams, may be made only in accordance with the regulations of the Federal Power Commission with reference to renewals, replacements and depreciation reserves and under "such rules and regulations as the (Federal Power) Commission may from time to time prescribe for the protection of life, health and property" (16 USC 803(c)), all in complete disregard of the sovereign rights of the several States.

f) To hold that the water power resources of the several States may be developed only subject to

the regulation of amortization reserves, determination of net investment, payment of fees to the United States and expropriation of excess profits by the United States, as determined by the Federal Power Commission, all in disregard of the sovereign rights of the various States (16 USC 803(d), (e)).

g) To hold that the United States may prohibit the development of water power resources within the several States, whether on navigable or non-navigable streams, unless the developer enters into a contract to permit the United States to "take over" such water power development for less than the fair value at the time of taking, with the result of greatly impeding, or even nullifying, the development of the water resources of the several States, depriving the several States of tax resources and, in practical effect, permitting the Federal Government to enter the domain of the several States for the purpose of engaging in a business or industry, in excess of the constitutional authority of the United States and in violation of the sovereign rights of the States.

h) To hold that, in complete disregard of the sovereign rights of the several States and their respective policies, the water power resources of the several States may be developed only by applicants receiving the approval of the Federal Power Commission upon plans which that Commission deems best adapted to develop, serve and utilize in the public interests the water resources of the region (16 USC 800).

i) To revise the long-established definition of navigable waters of the United States in such a way

as to deprive the several States of much, if not all, of the jurisdiction which they have exercised over the development of their natural resources since this Government was founded.

j) To revise the long-established rules of law with reference to the circumstances in which, and extent to which, the Federal Government may prevent development upon non-navigable streams under State authority and may so prevent in such a way as virtually to nullify the sovereign power of the several States to develop, conserve and utilize their natural resources at the times, in the manner, and by the means which they deem for the best interests of themselves and their peoples.

4. It is obvious that these powers sought to be exercised by the Federal Power Commission have no relation to the regulation or protection of navigation, but constitute an invasion of the field of State police powers. There can be no doubt that the decisions of this Court deny the possession by Congress of any unusual or peculiar jurisdiction over such navigable waters except to protect and regulate navigation. But this Court is asked by the government to overrule this long line of decisions and ordain new principles which would greatly enlarge the now established jurisdiction of the Congress, and would correspondingly curtail, reduce and impair the jurisdiction which the States have exercised since the adoption of the Constitution. The far-reaching effect of such a change in constitutional concepts is obvious. This proposed extension of congressional jurisdiction under the commerce clause and the application of like principles in other general fields of State and Federal activities

would result in confusion and chaos as to their respective jurisdictions, if not in a virtual paralysis of state governments in the exercise of their police powers.

5. If said contentions of the Federal Government were to be upheld, the adopted policies of the States of Virginia and West Virginia with reference to the conserving, development and utilization of their water resources will be largely, if not wholly, nullified and destroyed. The consequences to the sovereign rights of the States in this and other respects and to the welfare of their people would be of grave import. Moreover, if the questions sought to be raised by the Federal Government are deemed appropriate for decision in the above-entitled cause, the sovereign and proprietary rights of the States of Virginia and West Virginia in and over these and other natural resources may be effectually foreclosed and concluded without any opportunity on the part of said States adequately to present their contentions and views to this Court and with possibly irreparable prejudice to the interests and welfare of the said States.

6. For a further statement of the respects in which the State of Virginia considers its interests and its sovereign and proprietary rights to be affected, the Court is respectfully referred to the grounds upon which the State of Virginia based its motion for leave to intervene as party defendant, which grounds are set forth at pp. 1-9 of the "Motion of Commonwealth of Virginia for Leave to Intervene as Party Defendant," filed in this Court March 26, 1940. The attention of the Court is invited also to the Joint Resolution adopted March 5, 1940, by the Senate and House of Delegates of Virginia with reference specifically to the above-entitled cause, a copy of which resolution is appended as Exhibit A to the aforesaid motion for leave to intervene.

7. For the protection of their vital interests and those of their peoples, the States of Virginia and West Virginia each desire to file an adequate brief in this cause as *amicus curiae*, as authorized and permitted under the rules of this Court. But, unless adequate time is given for the preparation of such a brief, the right granted by the rules of this Court will be illusory and of little or no value to the said States and their peoples. Inasmuch as the States of Virginia and West Virginia each have vital interests, not merely in the broader issues of law, as in part set forth in paragraph 3 hereof, but also in the factual aspects of the case, a prerequisite to the preparation of such briefs will be adequate opportunity to examine the printed record, which is not yet available. The record was not printed in either of the courts below. Instead, the record filed in the Circuit Court of Appeals consisted of a typewritten copy of several thousand pages, which fact, aggravated by reason of several hundred riders attached to the record and of numerous longhand corrections, made its physical condition such that it has been impossible to examine or to work with the record. To make matters worse, of such typewritten record there exists but a single copy.

Furthermore in the usual case the record would have been printed and available before the petition for certiorari was heard, thereby enabling all the original parties, and states desiring to be heard as *amici*, to have a copy thereof and to have had opportunity for study of the same long in advance of the time that would have been necessary to write the respective briefs, yet in this case the record was not printed in the court below and this Court, for the purpose of considering the petition for certiorari, dispensed with the necessity for the printing of the record. Consequently there has not been opportunity for

any advance study of the printed record which it is understood will approximate 3,000 pages in length. Moreover, the preparation of adequate briefs cannot reasonably be initiated until there has been opportunity to examine the brief which is to be filed on behalf of the Federal Government and to determine the bases of the various claims apparently advanced by the Government in its petition for certiorari.

8. The undersigned have been informed by the Clerk of this Court that this cause is subject to call for argument during the week of April 22, 1940. Hearing at that time would not afford reasonable opportunity for the preparation of adequate briefs in behalf of the States of Virginia and West Virginia, respectively, in support of their vital interests in this litigation. In view of the foregoing facts, unless the hearing in this cause shall be continued until the October Term 1940, the States of Virginia and West Virginia will be greatly handicapped in such presentation of their respective views; and, if the hearing is not deferred until at earliest May 15, 1940, these States will, for all practical purposes, be deprived of the benefit of the right extended by this Court to the several States of the United States by rule No. 27, paragraph 9, to file, in causes such as this, adequate briefs covering the questions which affect their sovereign and proprietary rights.

The undersigned feel it their duty to apprise the Court of the fact that they severally or jointly have received letters from Attorneys General of other States who consider their interests may be vitally affected by this cause, and who desire to consider the advisability of submitting their views as *amici curiæ*. The Court is advised of this fact for such consideration as it may deem appro-

priate in view of the Rule of Court above referred to conferring upon all these States the right to file briefs *amicus curiae*. While thoroughly in sympathy with the attainment of all reasonable speed in passage of causes through the Courts, the undersigned submit, however, that, in view of the facts that it is nearly five years since the bill of complaint in this cause was filed and that the project on New River has already been constructed and is in operation, there is no justification for such haste as would result if the cause were called for argument at this term, nor indeed for such handicapping of the efforts of the various interested States, properly to prepare and present their views to this Honorable Court, or as would result if the cause were heard before the October Term 1940.

WHEREFORE, the States of Virginia and West Virginia pray that the hearing of the above cause be continued to the October Term 1940 of this Court, or, if this prayer be denied, then in the alternative, for the postponement of hearing to the latest day certain on which said cause can be heard during the October Term 1939, but not earlier than May 15, 1940.

Respectfully submitted,

ABRAM P. STAPLES,
Attorney General of Virginia.
CLARENCE W. MEADOWS,
Attorney General of West Virginia.

Richmond, Virginia.
April, 1940.